Supreme Court, U.S.
FILED
FEB 25 1994
OFFICE OF THE CLERK

No. 93-1208

In The

Supreme Court of the United States

October Term, 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY,

Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK,

Respondents.

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE RESPONDENTS, CLIFFORD L. DICK and PATRICIA A. DICK, appearing by counsel. RICHARD P. SENECAL of DUNCAN, SENECAL, BEDNAR AND ASHER, CHARTERED, hereby enter their opposition to the Petition of Henry Lewis McKinney and Lillie Marie McKinney, proceeding pro se, for Writ of Certiorari to review the Kansas Court of Appeals' Opinion filed on July 30, 1993, case number 68,581, and the review of said decision denied by the Kansas Supreme Court on September 28, 1993.

OPINIONS BELOW

The Respondents adopt and incorporate by reference herein those opinions designated by the Petitioners in the Petition for Writ of Certiorari as filed, and in addition refer the Court to the decision of the Honorable Michael G. Moroney in the District Court of Jefferson County, Kansas, which is attached hereto and designated as **APPENDIX A.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rules of the Supreme Court of the United States, contained at 28 U.S.C.A.

Rule 10.1(c). A review on writ of certiorari is not a matter of right, but judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered: (c) when a state court or United States Court of Appeal has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 14.1(f). The petition for a writ of certiorari shall contain, in the order here indicated: (f) Constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions

involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subsection .1(k) of this rule.

Rule 14.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Kansas Statutes.

Supreme Court Rule 141. No motion for summary judgment shall be heard or deemed finally submitted for decision until: (a) The moving party has filed with the Court and served on opposing counsel a memorandum or brief setting forth concisely in separately numbered paragraphs the uncontroverted contentions of fact relied upon by said movant (with the precise references to pages, lines and/or paragraphs of transcripts, depositions, interrogatories, admissions, affidavits, exhibits or other supporting documents contained in the court file and otherwise included in the record): and (b) Any party opposing said motion has filed and served on the moving party within 21 days thereafter, unless the time is extended by court order, a memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment (with precise references as required in paragraph [a], supra).

A motion may be deemed submitted by order of the court upon expiration of 21 days, or expiration of the court ordered extended period, after filing and service on opposing counsel of the brief or memorandum of moving party notwithstanding the failure of the opposing party to comply with paragraph (b) supra. In such cases the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief of moving party. In determining a motion for summary judgment the Judge shall state the controlling facts and legal principles controlling the decision in accordance with Rule 165.

STATEMENT OF THE CASE

This action arose out of a contract for deed. Over a period of approximately two years, two separate contracts were signed. On April 13, 1988, the Petitioners, Henry Lewis McKinney, and his wife, Lillie Marie McKinney, entered into a contract for deed with the Respondents, Clifford L. Dick and Patricia A. Dick. (R. Vol. I. Exhibit A.) Pursuant to the terms of the contract, the Petitioners paid to the Respondents $2,000.00, which sum was designated as earnest money. (R. Vol. I, Exhibit A.) The 1988 contract failed as a result of Petitioners' inability to obtain satisfactory financing from Capitol Federal Savings.

The Petitioners and Respondents then entered into a second contract dated January 20, 1990. (R. Vol. I, Exhibit B.) Pursuant to the terms of said contract, the Petitioners paid an additional $4,000.00 to the Respondents. (R. Vol.

I, Exhibit B.) The contract further designated a closing date of March 1, 1990. (R. Vol. I, Exhibit B.) Paragraph 18 of the contract further stated: "that Sellers and Buyers will furnish each other with abstracts of title to the above-described parcels of real estate certified to date showing merchantable title to said real estate, subject only to the exceptions herein set forth, if any. Buyers and Sellers shall then have a reasonable time to examine the same and make requirements in writing necessary to pass merchantable title as provided herein. In the event any requirements are made, Sellers and Buyers shall have a reasonable time to correct said requirements needed to pass merchantable title. Buyers will deliver to Sellers the abstract of title and deed to their property on or before February 10, 1990."

On or about February 16, 1990, the Petitioners notified the Respondents of their intention to rescind the January 20, 1990, contract. The stated basis for said recision was the fraudulent misrepresentation of the accessibility of the driveway. (R. Vol. I, pages 68-73.) On February 23, 1990, Petitioners' attorney also demanded a return of the earnest money and a return of the deed and again stated Petitioners' attempt to rescind the contract. The stated reason for said recision was Respondents' failure to furnish an abstract showing merchantable title and fraudulent misrepresentation of the driveway access. (R. Vol. I, pages 39-67; Exhibit G.)

On the 19th day of February, 1990, the Petitioners notified Respondents' attorney that the previous request for a title opinion could not be completed and requesting a return of their deed. (R. Vol. I, pages 39-67; Exhibit F.)

The Respondents filed suit in the District Court of Jefferson County, Kansas, on or about the 6th day of March, 1990. An amended petition was filed on the 19th day of April, 1990. Respondents' amended petition requested specific performance of the contract entered into on or about the 20th day of January, 1990, or in the event the Petitioners were not able to consummate the contract or any part thereof, that the Respondents be awarded damages for having had their property off the market for a considerable time, the expense of vacating the property to give Petitioners possession, and the loss of interest which they have or will have suffered, and such other and further relief as the Court would deem just and equitable. (R. Vol. I, pages 3-4; 39-67.)

On or about February 1, 1991, the Petitioners filed a motion for partial summary judgment. Petitioners requested that summary judgment be granted on the issue of the sale of Respondents' real estate near Perry, Kansas, and the cancellation for cause of the contract of April 13, 1988. The motion was accompanied by a memorandum containing both allegations of fact and arguments intermixed and no citations of law. (R. Vol. I, pages 243-244; 247-324.) The Petitioners requested that a hearing be held on the motion for partial summary judgment on February 21, 1991, at 9:30 a.m. (R. Vol. II, page 327.) On January 18, 1991, Respondents filed a motion for partial summary judgment on the issue of Petitioners' interest in the contested real estate and further announced therein that Respondents intended to exercise a remedy in breach of contract only. (R. Vol. I, pages

238-240.) Respondents also filed a motion for partial summary judgment on the issue of recision. (R. Vol. II, pages 337-342.)

Both the Petitioners' and the Respondents' motions for summary judgment were heard pursuant to Petitioners' notice of hearing on February 2., 1991. A memorandum decision on all motions for summary judgment was filed by the Court on May 17, 1991. All motions for summary judgment were denied. (R. Vol. III, pages 721-722.)

After the voluntary recusal of the original Judge sitting in the District Court of Jefferson County, Kansas, and the appointment of a successor Judge, the Petitioners again filed a motion to dismiss and motion for summary judgment. (R. Vol. III, pages 770-792.) A motion for summary judgment and motion to adopt Lillie Marie McKinney's motion to dismiss and motion for summary judgment was also filed. (R. Vol. III, pages 845-860.) Respondents responded to the motion of Lillie Marie McKinney to dismiss and for summary judgment, as well as Henry Lewis McKinney's motion for summary judgment and motion to adopt Lillie Marie McKinney's motion to dismiss and for summary judgment, but did not file competing motions. (R. Vol. III, pages 828-844; 875-891.)

ARGUMENTS

FIRST ARGUMENT: THE KANSAS COURT OF APPEALS APPROPRIATELY CHARACTERIZED THE RULING OF THE TRIAL COURT ON THE PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND NEITHER THE COURT OF APPEALS' CHARACTERIZATION OF SAID DECISION NOR ITS DECISION UPHOLDING THE TRIAL COURT'S DECISION DENYING THE PETITIONERS THE RETURN OF THEIR EARNEST MONIES AND REMANDING THE CASE FOR FURTHER PROCEEDINGS TO ALLOW THE RESPONDENTS TO PRESENT EVIDENCE AS TO DAMAGES CONSTITUTED A DENIAL OF THE PETITIONERS' DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment guarantees only that all persons are to be treated equally under the same conditions in like circumstances in the redress of wrongs and enforcement of modes of procedure. *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (U.S. Ariz. 1921); *Hoffman v. U.S.*, 767 F.2d 1431 (C.A. 9 1985). The due process clause guarantees a party an opportunity to present his case and have the merits of such case fairly judged. *Jackson Water Works, Inc. v. Public Utilities Commission of the State of California*, 793 F.2d 1090, *Certiorari denied* 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 184 (C.A. 9 1986). To establish a claim of equal protection or due process, the Petitioners must show that they possess a property or liberty interest which is protected, and then they must show a deprivation of that interest by the State. *American Federation of Government Employees, AFL-CIO v. U.S.*, 622 F.Supp. 1109, *Affirmed* 780 F.2d 720 (D.C. Ga. 1984).

The Petitioners, as the basis for their Petition for Writ of Certiorari, allege that they were denied due process and equal protection under the Fourteenth Amendment by a misrepresentation by the Kansas Court of Appeals of the trial court's decision of summary judgment. However, nowhere in the Petitioners' argument do they provide this Court with support for the contention that such a misrepresentation constitutes a denial of due process or equal protection or that a misrepresentation actually occurred. The Petitioners in essence assert that they presented facts contrary to the Court's decision and provide citations to the record where said facts were presented. Only once do the Petitioners assert that said representations were uncontroverted.

It is incumbent upon the Petitioners to clearly identify in the Petition for Writ of Certiorari those issues which warrant review by this Court and to provide support for the same. A mere allegation, although lengthy, that the trial court and Court of Appeals have wrongly viewed the facts, where such views do not involve an important question of federal laws, does not in and of itself warrant review.

It has previously been determined on several occasions that the Fourteenth Amendment, in guaranteeing equal protection of laws, does not assure uniformity of judicial decisions or immunity from judicial error. *J.H. Bauman v. Smrha*, 145 F. Supp. 617, D.Kan., *Affirmed* 352 U.S. 863, 77 S.Ct. 96, 1 L.Ed. 73 (1956); *Milwaukee Electric R. and Light Company v. State of Wisconsin, ex. rel. City of Milwaukee*, 252 U.S. 100, 40 S.Ct. 306, 64 L.Ed. 976 (U.S. Wis. 1920). Thus, it is not sufficient merely to state that the decision of the Court of Appeals might be viewed as

wrong, rather it must be shown that there was an intentional attempt on the part of the Court to disregard the law as applied to the Petitioners. The Respondents would assert that not only have the Petitioners completely failed to meet this requirement, but in addition such would be a difficult task, inasmuch as the rights of parties surrounding a summary judgment are very much within the discretion of the Court. See *Ruebke v. Globe Communications Corp.*, 738 P.2d 1246, 241 Kan. 595 (1987). The fact that one loses his case does not in and of itself show a denial of equal protection of the laws. *Sexton v. Berry*, 233 F.2d 220, *Certiorari denied* 352 U.S. 870, 77 S.Ct. 84, 1 L.Ed. 2d 76 (U.S. Ohio 1956). Further, it is incumbent upon the Petitioners to show discriminatory intent unless there is created an overtly discriminated class. *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989).

Within their argument, the Petitioners also seems to allege a violation of their right to equal protection and due process based upon an alleged deviation of the trial court from the procedural requirements of summary judgment and the Court of Appeals' upholding of the same. It should be noted that a violation of an individual's right to procedural due process or equal protection cannot be shown merely by establishing that a State (or in this instance a court) has deviated from its own established procedures. *Brandon v. District of Columbia Board of Parole*, 823 F.2d 644 (C.A.D.C. 1987). Again, it must be shown that the deviation was as a result of an intent to discriminate.

The decision of the Court of Appeals indicates that it did in fact carefully review the record and further indicates that a rational and factual basis for its decision exists. That the decision of the trial court and the Court of Appeals is different than that anticipated by the Petitioners or that which the Petitioners can accept as fair does not establish that a violation of their right to equal protection or due process has occurred.

SECOND ARGUMENT: THE PETITIONERS HAVE FAILED TO ASSERT FACTS UPON WHICH THIS COURT COULD CONCLUDE THAT THE KANSAS COURT OF APPEALS HAS INTENTIONALLY MISREPRESENTED THE KANSAS CONSUMER PROTECTION ACT, *K.S.A. 58-30*, AS IT APPLIES TO *DICK V. MCKINNEY*, AND AS SUCH HAVE FURTHER FAILED TO DESIGNATE HOW THE DECISION OF THE COURT REGARDING THE KANSAS CONSUMER PROTECTION ACT VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS AND/OR EQUAL PROTECTION UNDER THE LAW.

The Petitioners assert that the Kansas Court of Appeals violated their right to due process and equal protection under the law in affirming the trial court's dismissal of the Petitioners' claim under the Kansas Consumer Protection Act. First, the Respondents would note that although the Petitioners state that evidence from the record establishes the applicability of the Kansas Consumer Protection Act, the Petitioners fail to specify such evidence. In addition, the Petitioners further fail to designate or identify any portion of K.S.A. 60-208(d) in support of their allegation that the Respondents failed to respond as procedurally required or that the Appellate

Court's ruling upon such procedures was, as the Petitioners assert, "an intellectually bankrupt contention".

The rules of the Supreme Court regarding a Petition for Writ of Certiorari require that the Petitioners set forth any statutes, ordinances, or regulations involved in the case. The rules further state that the failure of the Petitioners to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying the petition. The Petitioners have altogether failed to provide this Court with adequate information under which it might judge whether the trial court in the first instance and the Court of Appeals in the second instance appropriately denied Petitioners' claim under the Kansas Consumer Protection Act or the procedures required by K.S.A. 60-208(d).

Also, as stated in previous argument, it is incumbent upon the Petitioners to specify not only the existence of a constitutionally protected interest, but the manner in which the Kansas Court of Appeals or trial court deprived the Petitioners of their right to due process of law or equal protection. *American Federation of Government Employees, AFL-CIO v. U.S.*, 622 F.Supp. 1109 (D.C. Ga. 1984), *Affirmed* 780 F.2d 720 (1986). A mere allegation that the Court's decision was in error in not sufficient. *Valtaskis v. C.I.R.*, 801 F.2d 622 (C.A. 2 1986).

THIRD ARGUMENT: THE PETITIONERS FAIL TO SPECIFY THE MANNER IN WHICH THE KANSAS COURT OF APPEALS' RULING ON "DAMAGES" CONSTITUTED A REWRITING OF THE 1988 AND 1990 CONTRACTS OR THE DECISION OF THE TRIAL COURT AND THEREBY CONSTITUTED A DENIAL OF THE PETITIONERS' FOURTEENTH AMENDMENT RIGHTS OF EQUAL PROTECTION.

The Petitioners argue that in remanding the Respondents' claim to the District Court for further hearing upon the issue of damages the Kansas Court of Appeals rewrote the 1988 and 1990 contracts. The Petitioners then argue that such a decision was erroneous and subjected the Petitioners to damages after they had been awarded summary judgment. In their argument, the Petitioners again fail to specify or provide support for the conclusion that such an action constituted a denial of Petitioners' right to equal protection other than to assert that the Court of Appeals and trial court were in error.

Further, in asserting that the trial court and Court of Appeals were in error, the Petitioners make several statements which are clearly misstatements of the record. First, the Petitioners assert that they were awarded "essentially unrestricted summary judgment", or in other terms "broad based summary judgment". The Respondents would assert that the award of summary judgment to the Petitioners was everything but essentially unrestricted and, further, that the term "broad based" can be found nowhere in either the decision of the trial court or the Court of Appeals but is an invention of the Petitioners. A careful reading of the trial court's decision, as well as the carefully reasoned decision of the Court of

Appeals, supports the conclusion of the Court of Appeals.

Petitioners also state that the trial court let stand Petitioners' argument that fraudulent misrepresentation of Respondents' access road justified recision. However, a reading of the decision of the trial court leads to the opposite conclusion.

The decision of the Court of Appeals as to "damages" was based upon the Respondents' appeal of the trial court's limitation of those damages based upon a characterization of the monies paid under the 1988 and 1990 contracts as anticipatory mitigation of damages. The issue was fully briefed by the Respondents and a responsive brief was filed by the Petitioners. The decision of the Court of Appeals is supported by both the information presented by the Petitioners and Respondents and the decision of the trial court when viewed in context of the Court's statement that Petitioners were granted summary judgment to the extent that it comported with the other rulings set forth within the trial Court's memorandum decision.

The Petitioners fail to provide any basis for their statement that the Kansas Supreme Court did not review the Court of Appeals' decision closely, or the trial court's opinion, or the record; they further provide no basis for the underlying assumption that had it done so, a different result would have been had or that absent an opposing result, the Petitioners have suffered a violation of their constitutional rights.

FOURTH ARGUMENT: THERE HAS BEEN NO DENIAL OF THE RIGHT OF EQUAL PROTECTION BY THE COURT OF APPEALS OR THE TRIAL COURT REGARDING MR. MCKINNEY'S MENTAL CONDITION WHEN THE 1990 CONTRACT WAS SIGNED.

As a final issue, the Petitioners propose that their right to equal protection has been somehow violated by the court's apparent refusal to excuse Mr. McKinney from the obligation of the contract due to his physical and/or mental condition. In support, Mr. McKinney states that extensive medical testimony has been introduced in the record that Mr. McKinney was mentally unable because of complications related to severe kidney failure to conclude any contracts whatsoever. Respondents would, however, take issue with Mr. McKinney's characterization of the medical evidence introduced as being testimony and, further, that any evidence introduced stated that he was mentally unable to conclude any contract whatsoever. In fact, Mr. McKinney's actions would belie this assertion and provide adequate support for the actions of the trial court and the Court of Appeals. The facts asserted by the Petitioners within this Petition for Writ of Certiorari and the course of this action indicate that Mr. McKinney acted as his own advisor and that of his wife over the course of the writing of the contract and in attempting to rescind the contract over abstract and fraud matters. Further, Mr. McKinney has acted as his own counsel throughout the course of this action, although he asserts that his health continues to worsen.

Lastly, under Kansas law a spouse has the ability to bind themselves to contracts separate and apart from their respective spouse. Therefore, any incompetence on

the part of Mr. McKinney would not excuse his wife, Lillie Marie McKinney. More importantly, however, Mr. McKinney again fails to show any violation of his right to equal protection as it relates to this issue. He has shown no intent to discriminate, nor has he given any legal basis whatsoever for asserting that the Courts' actions herein actually constitute or have resulted in a violation of his right to equal protection or due process.

CONCLUSION

Respondents respectfully request that the Supreme Court of the United States reject the Petition for Writ of Certiorari of Henry Lewis McKinney, and Willie Marie McKinney as it is without foundation in law or equity. Petitioners have provided no basis for their assertion that the Kansas Court of Appeals or the District Court of Jefferson County, Kansas, in the first instance has acted in a manner with the intent of or even the effect of violating the Petitioners' right to due process or equal protection of the law.

DATED this 25 day of February, 1994.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF JEFFERSON COUNTY KANSAS

CLIFFORD L. DICK AND PATRICIA A. DICK Plaintiffs, vs. HENRY LEWIS MCKINNEY AND LILLIE MARIE MCKINNEY Defendants.	)	Case No. 90-C-10

JOURNAL ENTRY AND MEMORANDUM DECISION

Now on this 16th day of June, 1992, comes on for hearing, the Defendant's Motion to Dismiss and Motion for Summary Judgment. The Court allows Defendant Henry L. McKinney to file, this date, his motion for summary judgment and plaintiffs have until July 2, 1992, to respond by memorandum brief. The plaintiff, having fully responded to all defendant's motions, and the Court having reviewed the file, the relevant case law, and being duly advised in the premises does make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. All the parties are lawful residents of the State of Kansas.

2. That plaintiffs are lawful residents of Jefferson County, Kansas, and the defendants are lawful residents of Douglas County, Kansas.

3. That the parties entered into a contract to convey realty on January 20, 1990.

4. That, pursuant to the contract of January 20, 1990, defendants tendered to plaintiff's earnest money, in the amount of $4000.00; which plaintiff's still hold.

5. That defendants gave notice of their intent to rescind the contract of January 20, 1990, on either February 16, 1990, or by letter of their attorney on February 23, 1990.

6. That plaintiff's have, since the alleged default of the contract by defendant's, sold the property in question.

7. That paragraph 22 of the contract of sale recites that time is of the essence.

8. That on the day for closing on the agreement, the defendant's had already taken action to notify plaintiff's of their intent not to close.

9. That the 1988 contract was effectively defaulted upon by defendant's [sic]; evidenced by the parties' having entered into the new January, 1990 contract.

10. That the plaintiff's still hold the $2000.00 earnest money pursuant to the 1988 contract.

11. That the above represents all material facts in this action.

APPLICABLE CASE LAW

1. Summary Judgment is appropriate where there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *Patterson v. Brouhard,* 246 Kan. 700, 702.

2. If factual issues do exist, they must be material to the case to preclude summary judgment. *Reubke v. Globe Communications Corp.,* 241 Kan. 595 (1987).

3. "The summary judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue *as to any material fact* and that the moving party is entitled to judgment *as a matter of law."* K.S.A. 60-256. *Bacon v. Mercy Hospital of Ft. Scott,* 243 Kan. 303 at 306 (1988).

4. "A fact is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction involved." *Timi v. Prescott State Bank,* 220 Kan. 377 (1976).

5. *Nordstrom v. Miller,* 227 Kan. 59 (1980) has some telling comments on this point (at p. 65):

"The witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be narrated exactly and in order; the testimony must be clear direct and weighty; the witnesses must be lacking in confusion as to the facts at issue." *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.,* 226 Kan. 70, 78, 596 P. 2d 816 (1979). *Gonzalez v. Allstate Ins. Co.,* 217 Kan. 262, Syl. Par. 1; *In re Estate of Shirk,* 194 Kan. 424, Syl. 2, 399 P. 2d 850, *rehearing denied* 194 Kan. 671, 401 P. 2d 279 (1915).

6. A party to a contract may properly rescind said contract if the other party materially breaches the contract.

7. Defendants frivolously rescinded the January 20, 1990 contract because of an imagined lack of marketability of Plaintiffs' abstract of title as of February 13, 1990, and before March 1, 1990. The rescission was invalid and frivolous.

8. The Court finds that it is uncontroverted, admitted by both sides, that the original contract fell through, that the proposed sale of the subject realty could not be consummated and that it was defendants' [sic] who permitted this, thus forfeiting the original $2000.00 – Two Thousand Dollars in earnest money.

9. There can be no doubt in the mind of anyone, lawyer, layman, or judge, that this type of eventuality was precisely why earnest money was tendered.

Hence, the plaintiffs herein, shall keep the aforementioned earnest money as agreed, just compensation for having had their realty off the open market temporarily and anticipatory mitigated damages.

10. The parties, still interested in finalizing a lawful transfer of this realty, renewed negotiations and once again, executed an agreement, this time incorporating a tender of $4000.00 – as earnest money.

11. Defendants refused to follow through with the necessary final steps to finalize the transfer of the subject realty.

12. It is this Court's belief that this operated as a lawful forfeiture of the second earnest money, the $4000.00, Four Thousand Dollars – aforementioned.

13. Therefore, the Court finds that plaintiffs shall be entitled to retain the $6000.00 – Six Thousand Dollars; all fully intended from the inception of the bargaining process, to have been earnest money, and anticipatory mitigation of damages.

14. The Court chooses not to comment upon what the court file appears to reflect; an inordinately endless series of motions and superfluous requests. Therefore, the costs incurred by the parties shall be born [sic] by the parties so experienced them.

15. The Motion for Summary Judgment is granted, insomuch as it comports with the above mentioned rulings.

BE IT SO ORDERED.

I hereby certify the above and foregoing
to be a true and correct copy, the original
of which is filed and entered on record in
this court on July 13, 1992 .
EVELYN A. TAYLOR
JEFFERSON CO KANSAS

Dated July 13, 1992

By Evelyn A. Taylor

/s/ M G Moroney
HONORABLE
MICHAEL G. MORONEY
Judge of the District Court
Division Thirteen
29th Judicial District